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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/844,822	04/26/2001	William P. Apps	RPC 0572 PUS	4123

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KONSTANTINE J. DIAMOND
4010 E. 26TH STREET
LOS ANGELES, CA 90023

EXAMINER

CASTELLANO, STEPHEN J

ART UNIT PAPER NUMBER

3727

DATE MAILED: 09/12/2003

15

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Applicati n N .

09/844,822

Applicant(s)

APPS ET AL.

Examiner

Stephen J. Castellano

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-3,12-16 and 18-55 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-3,12-16 and 18-55 is/are rejected.
- 7) ☒ Claim(s) 1-3 and 55 is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on ____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). ____.
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 9,12. 6) ☐ Other: .

Claims 1-3 and 55 are objected to because of the awkward lack of punctuation between the words "edge" and "each" in claim 1. It seems that one statement or phrase ends with the word "edge" and another phrase begins with the word "each." No comma or semi-colon separates the two phrases.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-3, 13, 14, 22, 30, 31 and 55 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1 recites the limitation "at least one of the lower wall portions" in line 1. There is insufficient antecedent basis for this limitation in the claim because the claim previously refers to "a lower wall portion" rather than a plurality of lower wall portions. Also, it can't be determined what is being referred to by the word "each" in line 8 of claim 1, lower edge, upper edge, lower wall portions, corners or corner pylons.

Claim 13 recites the limitation "the side structural member" in line 1. There is insufficient antecedent basis for this limitation in the claim because it can't be determined which of a pair of side structural members is meant.

Claim 14 recites the limitation "the side structural member" in lines 1 and 2. There is insufficient antecedent basis for this limitation in the claim because it can't be determined which of a pair of side structural members is meant. Also, the word "each" in line 2 seems inappropriate where it refers to only one. Perhaps the word "each" should be deleted or both structural side members could be referred to.

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Claim 22 recites the limitation "the bottom member" in line 1. There is insufficient antecedent basis for this limitation in the claim.

Claim 30 recites the limitation "its" in line 2. This word seems inappropriate where "its" refers to side structural members. It can't be determined which side structural member is being referred to.

Claim 31 recites the limitation "the side structural member" in line 1. There is insufficient antecedent basis for this limitation in the claim because it can't be determined which of a pair of side structural members is meant.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 12-14, 16, 18-31, 33-44 and 50-53 are rejected under 35 U.S.C. 102(b) as being anticipated by Apps et al. ('874) (Apps).

Apps discloses a stackable low depth bottle case comprising a floor structure, a pair of side structural members including a lower edge and an upper edge, pylons, corner pylons, columns, one of the columns extending a first height above a first location, another of the columns extending a second height above a second location, a column is located at the intersection of the longitudinal axis and the transverse axis, the columns have upper surfaces which are coplanar.

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Re claims 16 and 33, see Fig. 4, 5, 15 and 16 for ribs on the case bottom which define retaining tabs which attach the side members to the floor structure and which define an interior surface of the inner compartment between adjacent pylons.

Re claims 21 and 39, see Fig. 9a and 9b for bottle closure acceptance areas.

Re claims 22 and 23, see Fig. 9a and 9b for the bottle closure acceptance areas and see Fig. 4, 5, 15 and 16 for ribs that form the resting and guiding means including rib formations.

Re claims 24, 25, 40 and 41, see Fig. 2 and vertical wall 29 which is a portion of the column, which extends below the lower edge of the side structural member and which is substantially coplanar with the lower surface of the floor structure.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Note that: a wave may have many shapes, sinusoidal, square, saw tooth, etc.

Claims 1-3, 12-16, 18-40 and 42-55 are rejected under 35 U.S.C. 103(a) as being unpatentable over Apps ('874) in view of Kelly, Kappel et al. (Kappel) and Exhibit 2 from D.W. Plastics.

Even though rejected above, claims 12-14, 16, 18-23, 26-31, 33-39, 42-44 and 50-53 have been repeated in this rejection to show that these claim's limitations are still met after modifying the lower wall portion to have differently contoured upper and lower edges.

For claim 1, Apps discloses a stackable low depth case for retaining and transporting bottles, the case comprising opposing side walls, opposing end walls, a bottom; the side walls

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including a lower wall portion having an upper edge and a lower edge, spaced pylons, four corner pylons and columns. Apps discloses the invention except for the upper edge and lower edge having a curved shape.

For claims 12, 29, 45 and 50, Apps discloses a stackable low depth bottle case comprising a floor structure, a pair of side structural members including a lower edge and an upper edge, pylons, corner pylons, columns, one of the columns extending a first height above a first location, another of the columns extending a second height above a second location, a column is located at the intersection of the longitudinal axis and the transverse axis, the columns have upper surfaces which are coplanar.

For claim 45, Apps discloses the invention except for the height of the first location being vertically offset from the height of the second location.

Kelly teaches a beverage container case having opposing side walls, the side walls including a lower wall portion (the wave-shaped logo portion), the upper and lower edges of the lower wall portion are curved. Kappel teaches a bottle case having opposing side walls (the walls at the ends, one is shown with the word "SLOGAN"), the side walls including a lower wall portion (the wave-shaped portion 31), the upper and lower edges of the lower wall portion are curved. It would have been obvious to one having ordinary skill in the art to have employed the integrally molded contoured wave-shape of Kelly, Kappel and D.W. Plastics in modifying the shape of the lower wall portion to provide a contoured wave-shaped upper and lower edge as motivated by the consumer exposure to an advertisement logo and the durability of an integrally molded design which can't be peeled or easily broken off. This modification also provides the vertical offset configuration mentioned in claim 45.

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Claims 24, 25, 40 and 41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Apps ('874) (Apps) in view of Sauey.

This rejection has been made in the event that wall 29 should not be deemed to be part of the column.

Apps discloses the invention except for the vertically extending portion. Sauey teaches columns 34, 32, 31 formed by the finger depressions 31 wherein the columns have vertically extending portions disposed below the lower edge of the side structural members and substantially coplanar with the lower surface of the floor structure. It would have been obvious to modify the columns of Apps to include the vertically extending portions to seal the upper chamber or pocket of the case to prevent the contents from slipping through an opening.

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-3, 12-16 and 18-55 are provisionally rejected under the judicially created doctrine of double patenting over claims 1-16 of copending Application No. 09/626,517. This is a provisional double patenting rejection since the conflicting claims have not yet been patented.

The subject matter claimed in the instant application is fully disclosed in the referenced copending application and would be covered by any patent granted on that copending application since the referenced copending application and the instant application are claiming common subject matter, as follows: A stackable low depth case comprising side walls, end walls, bottom, pylons and columns.

Furthermore, there is no apparent reason why applicant would be prevented from presenting claims corresponding to those of the instant application in the other copending application. See *In re Schneller*, 397 F.2d 350, 158 USPQ 210 (CCPA 1968). See also MPEP § 804.

Claims 1-3, 12-16 and 18-55 are rejected under the judicially created doctrine of double patenting over claims 1-30 of U. S. Patent No. 5,660,279 to Apps et al.; over claims 1-16 of U. S. Patent No. 5,651,461 to Apps et al.; over claims 1-9 of U. S. Patent No. 5,529,176 to Apps et al.; and Fig. 1-6 of U. S. Design Patent No.378,249 to Apps et al. since the claims, if allowed, would improperly extend the "right to exclude" already granted in the patent.

The subject matter claimed in the instant application is fully disclosed in the patent and is covered by the patent since the patent and the application are claiming common subject matter, as follows: A stackable low depth case comprising side walls, end walls, bottom, pylons and columns.

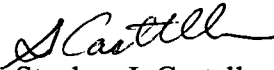
Furthermore, there is no apparent reason why applicant was prevented from presenting claims corresponding to those of the instant application during prosecution of the application which matured into a patent. See *In re Schneller*, 397 F.2d 350, 158 USPQ 210 (CCPA 1968). See also MPEP § 804.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Stephen J. Castellano whose telephone number is 703-308-1035. The examiner can normally be reached on M-Th 6:30-5.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Lee W. Young can be reached on 703-308-2572. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9302 for regular communications and 703-872-9303 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1148.


Stephen J. Castellano
Primary Examiner
Art Unit 3727

sjc
September 3, 2003